Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1997

Ross E. Mitchell,
Petitioner

v.

Robert A. Mulligan,
In his Official Capacity as Chief Justice
Of the Superior Court of Massachusetts,
Respondent

On Petition for a Writ of Certiorari
To The United States Court of Appeals
For the First Circuit

Petition for a Writ of Certiorari

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20 pp

QUESTION PRESENTED

Does the fundamental right of self-representation, recognized in *Faretta v. California*, extend to civil matters, thereby requiring strict scrutiny of government policies that restrict access to court information for *pro se* civil litigants while allowing free and unrestricted access to any attorney representing a civil litigant?

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Ross E. Mitchell hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The unreported opinion of the United States Court of Appeals for the First Circuit is reproduced at App. 1. No opinion was rendered by the United States District Court for the District of Massachusetts.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on December 12, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner, Ross E. Mitchell, is a resident of Newton, Massachusetts and a *pro se* civil litigant in the Massachusetts Court system.

In November of 1996, Mitchell read in the October 21, 1996 issue of Massachusetts Lawyers Weekly of a free dial-up system for accessing Superior Court dockets and calendars known as SCRIB (Superior Court Remote Inquiry for the Bar), which provides remote access to the Court's Forecourt system.

The article stated that the "main function of the SCRIB system is to give practitioners access to

docketing information as if they were using computer terminals located at the courts."

The article further stated that "[a]ny Massachusetts lawyer with a computer and a modem can access the service free of charge, establishing a direct link to all docketing information available at the courts." The article gave the name of a court official whom attorneys wishing to use SCRIB should contact to be connected to the system.

Mitchell, who had been making extensive use of the computer terminals at the courthouse in prosecuting his case, decided to request remote access to the system to facilitate the conduct of his litigation. He contacted the court official and asked to be hooked up to SCRIB. Mitchell asserted that although he was not an attorney his "ability to prosecute litigation in the Massachusetts courts would be prejudiced against [him] should [he] be denied access to the SCRIB system by dial-in while [his] opponent's counsel is permitted such access without needing to travel to the courthouse." Mitchell's request was denied on the ground that, by order of the Chief Justice, remote dial-up access was available only to attorneys.

On February 22, 1997 Mitchell wrote the Chief Justice to request that the policy of denying dial-up access to non-attorneys be changed and that he be granted immediate access to the system. Mitchell gave numerous reasons as to why he should be accorded access, including his need to check his case's status, to consult the court's calendar and to research other case dockets to assist him in the prosecution of his case.

Mitchell stated that he recognized that system resources might be insufficient to permit unrestricted

access to any member of the public; however, he suggested that "people involved in adversarial proceedings must be offered access on an equal basis with their opponents."

The Chief Justice denied Mitchell's request, writing that the Superior Court's computer system was designed expressly for the purpose of enabling attorneys with heavy caseloads before the Superior Court to synchronize, from their offices and without burdening the Court's staff, their own appearance calendars with the Court's calendars.

Mitchell then filed suit in U.S. District Court in Boston pursuant to 42 U.S.C. § 1983, alleging that the Superior Court's remote dial-up access policy violated his Fourteenth Amendment rights of, *inter alia*, due process and "equal access." The District Court dismissed the Complaint pursuant to F.R.C.P. 12(b)(6), and subsequently denied leave to amend.

On appeal, Mitchell argued that the Superior Court's policy of denying remote computer access to *pro se* litigants while providing such access to any attorney who requests it was not rationally related to a legitimate government interest, and further, infringed a fundamental right: the right of self-representation.[1]

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1 The Chief Justice argued that the policy of denying access to *pro se* litigants "serves the valid governmental interest of preserving limited computer resources to allow attorneys with substantial business before the Superior court to coordinate their court schedules without burdening court personnel" and that "there is no reasonable alternative for the Superior court to achieve the same ends by less burdensome means." Mitchell responded by pointing out that denying him access worked against the court's own stated purpose since it forced him to

Following extensive briefing by both sides, including a Brief of *Amicus Curiae* in support of Petitioner by the American Association of Law Libraries, the Court of Appeals for the First Circuit affirmed the dismissal, stating that the policy had a rational basis and did not infringe any fundamental rights. App 1.

Several days prior to the Appeals Court decision, on December 1, 1997, the Massachusetts Superior Court dismissed Mitchell with prejudice from the litigation in which he had been a defendant. On the same date, Mitchell filed a new action in Superior Court against the prior plaintiff. This action has been dismissed without prejudice for want of jurisdictional amount.

Mitchell's claims against the Superior Court continue to be ripe for review for two reasons. First, Mitchell continues to require access to Superior Court docket records as he pursues his action against the

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contact and occupy the time of these same court personnel. Since the actual result of the court's policy of denying remote access to *pro se* litigants is to increase rather than decrease the workload on court personnel, the policy is irrational and arbitrary and, consequently, does not advance a legitimate state interest. The policy should, therefore, be stricken even if the invalidation results in an additional administrative inconvenience to the governmental body since, administrative convenience, by itself, does not constitute a valid basis for the imposition of disparate treatment upon persons who, with respect to the activity in question, are basically in the same position as others who are not singled out for different treatment. E.g. *Rinaldi v. Yeager*, 384 U.S. 305; *Baxtrom v. Herold*, 383 U.S. 107, 111.

While Petitioner continues to believe that the Superior Court's policy cannot withstand even "rational basis" scrutiny, this claim is not pursued in the instant petition.

prior plaintiff. Second, even if Mitchell's present need of remote computer access were deemed no longer to exist, Mitchell qualifies under the exception to the mootness doctrine for injuries capable of repetition yet evading review.

Mitchell represents himself in most legal matters, having already prosecuted one adoption, several patent applications, and the present and related litigation *pro se*. Mitchell has no intention of leaving Massachusetts. Consequently, it is likely that Mitchell will again have the opportunity to avail himself of the services of the Superior Court and, therefore, he is likely again to be subjected to the above-referenced discrimination against him as a *pro se* litigant.

REASONS FOR GRANTING THE PETITION

Petitioner Mitchell seeks the intervention of this Court to determine whether or not the fundamental right of self-representation in a criminal case, recognized by this court in *Faretta v. California*, 422 U. S. 806 (1975), extends to civil litigation. If it does, then strict scrutiny should be applied to the Superior Court's policy of denying remote access to *pro se* litigants.

Petitioner further requests that this Court intervene in this case to make clear that courts may not discriminate against one party to a litigation solely on the basis of that party's self-represented status.

Lower Court Decisions on the Right of Self-Representation Conflict with the Reasoning and Holding of This Court in Faretta and are Erroneous

It is well known that, under *Faretta v. California*, defendants in a criminal case enjoy a fundamental right of self-representation. However, this Court has not ruled as to whether this right extends to litigants in civil cases.

Several Circuit Courts of Appeal have concluded that no such fundamental right exists. *O'Reilly v. New York Times Co.*, 692 F.2d 863, 867 (2d Cir. 1982)(right of self-representation in civil cases conferred by Section 35 of the Judiciary Act of 1789, "although not enjoying the constitutional protection subsequently afforded to the right of self-representation in criminal cases"); *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 137 (1st Cir. 1985)("There is no constitutional right to self-representation in civil cases."); *Eitel v. Holland*, 787 F.2d 995, 998 (5th Cir. 1986).

In *Eitel, supra,* the Fifth Circuit concluded that this determination is supported by dicta in the *Faretta* opinion, for this Court there held that the right to represent oneself in a criminal case is derived from the sixth amendment, which embodies the personal right to make a defense to criminal charges. *Faretta,* at 818-819. Since the sixth amendment applies only in "criminal prosecutions" (U.S. Const. Amendment VI), the Fifth Circuit concluded that it, therefore, cannot be the parallel right to self-representation in civil cases.

Notwithstanding the decisions of these Circuits, petitioner respectfully submits that the fundamental right of self-representation applies to all matters, civil as well as criminal, and that the rationale used by this Court in deciding *Faretta* leads inexorably to that conclusion.

To begin with, unlike numerous state constitutions[2], the Sixth Amendment does not explicitly confer any right of self-representation in a criminal trial, merely a right to counsel. In *Faretta*, note 15, this Court wrote:

> The inference of rights is not, of course, a mechanical exercise. In *Singer v. United States*, 380 U.S. 24, the Court held that an accused has no right to a bench trial, despite his capacity to waive his right to a jury trial. In so holding, the Court stated that "[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right." Id. at 34-35. But that statement was made only after the Court had concluded that the constitution does not affirmatively protect any right to be tried by a judge, and concluded that these were "clear departures from the common law." *Ibid.*
>
> We follow the approach of *Singer* here. Our concern is with an *independent* right of self-representation. We do not suggest that this right arises mechanically from a defendant's power to waive the right to the assistance of counsel. See *supra*, at 814-815. On the contrary, the right must be independently found in the structure and history of the constitutional text.

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2 For example, Article XII of the Massachusetts Constitution states "And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election."

What this Court found in that history was a society where lawyers were mistrusted and where self-representation was the norm:

> The colonists brought with them an appreciation of the virtues of self-reliance and a traditional distrust of lawyers. When the Colonies were first settled, "the lawyer was synonymous with the cringing Attorneys-General and Solicitors-General of the Crown and the arbitrary Justices of the King's Court, all bent on the conviction of those who opposed the King's prerogatives, and twisting the law to secure convictions." This prejudice gained strength in the Colonies where "distrust of lawyers became an institution." Several Colonies prohibited pleading for hire in the 17th century. The prejudice persisted into the 18th century as "the lower classes came to identify lawyers with the upper class." The years of Revolution and Confederation saw an upsurge of antilawyer sentiment, a "sudden revival, after the War of the Revolution, of the old dislike and distrust of lawyers as a class." In the heat of these sentiments the Constitution was forged.

Faretta, at 827 (citations omitted). The right of self-representation in all matters was guaranteed, indeed assumed, in many colonial charters and declarations of rights. It was the right to counsel that needed to be granted. And where it was, the engagement of paid counsel was sometimes forbidden. For example, the Massachusetts Body of Liberties (1641) in Art. 26 provided:

> "Every man that findeth himselfe unfit to plead his owne cause in any Court shall have Libertie to imploy any man against whom the Court doth not except, to helpe him, Provided he give him noe fee or reward for his paines..."

The right to counsel was supplemental to the primary right of self-representation. Again, in *Faretta*, the Court wrote:

> The Founders believed that self-representation was a basic right of a free people. Underlying this belief was not only the anti-lawyer sentiment of the populace, but also the "natural law" thinking that characterized the Revolution's spokesmen. See P. Kauper, The Higher Law and the Rights of Man in a Revolutionary Society, a Lecture in the American Enterprise Institute for Public Policy Research Series on the American Revolution, Nov. 7, 1973, extracted in 18 U. of Mich. Law School Law Quadrangle Notes, No. 2, p.9 (1974). For example, Thomas Paine, arguing in support of the 1776 Pennsylvania Declaration of Rights, said:
>
> "Either party...has a natural right to plead his own cause; this right is consistent with safety, therefore it is retained; but the parties may not be able,...therefore the civil right of pleading by proxy, that is, by a council, is an appendage to the natural right [of self-representation]...." Thomas Paine on a Bill of Rights, 1777, reprinted in 1 Schwartz 316.

Faretta, note 39. (emphasis added). The Court's recognition of this basic or "natural law" right

of self-representation is what permits it to look at the Sixth Amendment and to find therein, in addition to a right to counsel, a fundamental right of self-representation.

Were the "natural law" right of self-representation not to exist, under *Singer*, the Court would have been compelled to find that no affirmative right to self-representation exists in the Sixth Amendment since there is no explicit wording creating it.

Thus, the fundamental right to self-representation is not "found" in the Sixth Amendment; it is exposed under the Sixth Amendment. Like the right to travel, the right to plead one's own cause need not be explicitly stated; it is as natural as the right to breathe the air. It is part of the fabric of the Constitution because it was part of the fabric of the society that crafted the Constitution.

This right necessarily applies as much to civil litigants as to criminal defendants. Surely, the civil litigant "will bear the personal consequences" of a defeat, and therefore, "must be free personally to decide whether in his particular case counsel is to his advantage." *Faretta*, at 834. Were this not so, then the historical foundation on which *Faretta* is built would crumble.

This then leads to the pertinent question raised by the dissenters in *Faretta*: If a fundamental right of self-representation exists at all, why then is it provided for in Section 35 of the Judiciary Act of 1789 yet omitted from the Sixth Amendment? Chief Justice Burger wrote in dissent:

> The text of the Sixth Amendment, which expressly provides only for a right to counsel, was proposed the day after the Judiciary Act was signed. It can hardly be suggested that the Members of the Congress of 1789, then few in number, were unfamiliar with the Amendment's carefully structured language, which had been under discussion since the 1787 Constitutional Convention. And it would be most remarkable to suggest, had the right to conduct one's own defense been considered so critical as to require constitutional protection, that it would have been left to implication. Rather, under traditional canons of construction, *inclusion* of the right in the Judiciary Act and its *omission* from the constitutional amendment drafted at the same time by many of the same men, supports the conclusion that the omission was intentional.
>
> There is no way to reconcile the idea that the Sixth Amendment impliedly guaranteed the right of an accused to conduct his own defense with the contemporaneous action of the Congress in passing a statute explicitly giving that right.

Faretta, Burger Dissent, at 844. There is, indeed, a way to reconcile this apparent contradiction. But, it requires a paradigm shift.

Petitioner submits that the reason Section 35 of the Judiciary Act of 1789 cannot be reconciled to the implicit right of self-representation is that Section 35 was not enacted to grant a statutory right of self-representation at all. On the contrary, Section 35 was enacted to grant a statutory right to <u>counsel</u>; it made it

clear that parties in Federal Court would have the right to be represented. People already had the right to appear personally; that was the norm. They didn't need the statute to accord them that right. As Thomas Paine wrote, "Either party...has a natural right to plead his own cause." "[T]he civil right of pleading by proxy, that is, by a council, is an appendage to the natural right [of self-representation] ...." Paine, *supra.*

Just as a statute regulating some aspect of a fundamental right does not alter the fundamental nature of that right, neither does the affirmation of such a right in a statute alter its fundamental nature. Had there been no Section 35, it would have been unclear as to whether counsel could appear on behalf of parties, but certainly not as to whether parties could appear on their own behalf.[3]

With a statutory right to counsel in place, the Framers determined that more than statutory protection was needed for the criminal defendant's right to counsel. They created a constitutional right to counsel in criminal prosecutions to supplement the statute and to complement the implicit natural right of self-representation, the same implicit right that the Court has relied on in *Faretta.*

Justice Blackmun contends that the "[Sixth] Amendment's silence as to the right of self-representation indicates that the Framers simply did

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3 Only in the infamous Star Chamber of England had defendants been compelled to be represented by counsel. Finally, in 1641 the Star Chamber was swept away by the revolutionary fervor of the Long Parliament. The notion of obligatory counsel disappeared with it. See *Faretta*, at 821-823.

not have the subject in mind when they drafted the language." *Faretta*, Blackmun Dissent at 850.

There was simply no reason to have it in mind, as it was such an obvious and basic right. As the Court wrote:

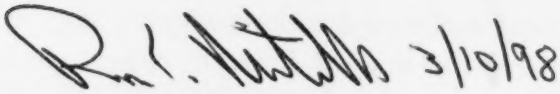
> "If anyone had thought that the Sixth Amendment, as drafted, failed to protect the long-respected right of self-representation, there would undoubtedly have been some debate or comment on the issue. But there was none. In sum, there is no evidence that the colonists and the Framers ever doubted the right to self-representation, or imagined that this right might be considered inferior to the right of assistance of counsel." *Faretta*, at 832.

Thus, petitioner respectfully submits that the right to self-representation in all matters, civil and criminal, is a fundamental right under our Constitution. The Superior Court's remote access policy significantly burdens that right, and must, therefore, be subjected to strict scrutiny. This court's intervention is needed to settle this important question.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,



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March 1998

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 97-1737 December 12, 1997

Ross E. Mitchell,
Plaintiff, Appellant,
v.
Robert A. Mulligan, in his Official Capacity as Chief Justice of the Superior Court of Massachusetts,
Defendant, Appellee.

Per Curiam. We have carefully reviewed the record and briefs and conclude that dismissal was proper. The Constitution does not require governmental decision-makers to treat all individuals identically. Differences in treatment which are rationally related to legitimate state interests are permissible unless they trammel fundamental rights or are drawn upon inherently suspect distinctions. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam). The rational basis for the Superior Court's policy is manifest from the complaint and accompanying documents. The policy engenders no suspect classification and deprives the appellant of no fundamental right. Under the circumstances, the district court did not abuse its discretion by denying the appellant leave to amend.[1]

The judgment below is affirmed. *See* 1st Cir.Loc.R. 27.1.

1. Appellant's motion for oral argument is hereby denied.